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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 30, 1998

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Ex Parte Submission in CC Docket No. 97-231; CC Docket No. 97-121; CC Docket No. 97-208; CC Docket No. 97-137

Dear Ms. Salas:

On April 30, 1998, MCI submitted the attached document entitled "MCI's Responses to BellSouth's Questions on Section 271 Legal Issues" to Carol Mattey of the Common Carrier Bureau in response to legal issues relating to section 271 that were raised by staff.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(2) of the Commission's rules.

Sincerely,

Keith L. Seat

Attachment

cc: Carol Mattey

MCI'S RESPONSES TO BELLSOUTH'S QUESTIONS ON SECTION 271 LEGAL ISSUES

MCI comments below on selected questions in BellSouth's letter to the Federal Communications Commission dated March 31, 1998. MCI's comments are directed to questions on section 271 legal issues. As indicated below, MCI's previous responses to questions from Commission staff, which MCI submitted on April 28, 1998, address many of the issues in BellSouth's letter.

MCI's responses are included in the order presented in BellSouth's letter:

General Question #4

Q: Has the staff determined whether the Commission could grant a conditional authorization? If so, has it identified circumstances in which it would grant such an authorization?

RESPONSE:

It is not clear what BellSouth refers to as a "conditional authorization." To the extent "conditional authorization" refers to a grant of section 271 authority prior to full implementation of the competitive checklist, such a decision would not be authorized by the Act. § 271(d)(3). The Commission has made clear that a BOC must fully implement the checklist and comply with all other requirements of section 271 *before* section 271 approval can be granted. See, e.g., South Carolina Order, ¶ 38. An application must be complete when filed, and a BOC may not rely on promises of future action to satisfy the requirements of section 271. Id.

Of course, in denying an application the Commission may tentatively conclude that a BOC has satisfied certain checklist items, and identify specific areas where a BOC has fallen short of the requirements of the Act. A tentative or preliminary assessment that certain checklist items have been met must, however, be assessed de novo at the time of a new application, based

on all facts presented in the record in the new application. Earlier decisions on identical issues will, of course, be relevant to the Commission's inquiry, particularly if the record has not changed on a particular issue.

Unbundled Elements #1

Q: In responding to Senator McCain's letter you said the following about checklist item 2:

> *A BOC must also demonstrate that the interfaces used to access its OSS functions allow competing carriers to transfer the information received from the BOC . . . among the various interfaces provided by the BOC (e.g., pre-ordering and ordering interfaces).*

What does this statement mean? To show compliance with this checklist item, must the RBOC demonstrate that its OSS allow the CLEC to transfer information between the pre-ordering and ordering interfaces?

RESPONSE:

The BOC must provide system-to-system interfaces that allow for the transfer of information between the BOC systems and CLEC systems without manual intervention. This includes information received from the BOC at the pre-order stage, which the CLEC can then manipulate and send some of it back to the BOC in the form of orders, without the need for re-entry of the information. The same need for system-to-system interfaces also applies to information in provisioning notices, information concerning maintenance and repair, and information for billing. The Commission made clear the need for system-to-system interfaces in its South Carolina order when it discussed the disadvantages of BellSouth's non-system-to-system LENS pre-order interface. (South Carolina Order ¶¶156-58). Indeed, the Commission emphasized that even a screen scraping process "puts new entrants at a competitive disadvantage,

because it can lead to delays while the customer is on the line and may limit a new entrant's ability to process a high volume of orders." (South Carolina Order ¶162).

Unbundled Elements #2

In that same discussion you said:

> *While actual commercial usage is the most probative evidence that the BOC's OSS functions are operationally ready, the Commission will also consider carrier-to-carrier testing, independent third-party testing, and internal testing.*

Does "operationally ready" mean "working?" If so, a machine-to-machine interface cannot be "operationally ready" until a CLEC decides to build its side. Please clarify. . . .

RESPONSE:

The Commission has explained that an "operationally ready" interface is an interface that handles current demand and is capable of handling reasonably foreseeable future demand at parity in terms of quality, accuracy, and timeliness. Michigan Order ¶¶138-39. The Commission has also explained that the BOC must generally rely on evidence of successful commercial usage to prove operational readiness unless the absence of commercial usage is attributable to the competing carriers' business decisions. Michigan Order ¶ 138. However, where the absence of commercial usage results from the fact that OSS development by the CLECs necessarily requires time, or where the CLECs OSS development has been delayed by impediments to competition created by the BOCs, the BOC must wait to show the readiness of its OSS until there has been sufficient time for the CLECs to overcome those obstacles and for commercial usage to arise. Thus, only where the CLECs are not making reasonable efforts to use the BOC's OSS, judged in light of the obstacles created by the BOC, can evidence other than commercial readiness be sufficient to show operational readiness.

Unbundled Elements ## 3-5

Q: In that same discussion, at one point you state that ILECs must provide technically feasible methods of obtaining interconnection or access to UNEs that include, but are not limited to, physical and virtual collocation. At another point you indicate that:

> *a BOC may satisfy the nondiscrimination requirement by providing physical or virtual collocation . . . [or] logical or electronic methods for combining network elements for, or combining the elements on behalf of competing carriers for a separate charge.*

In your view can an ILEC satisfy this checklist item solely through the provision of physical and virtual collocation?

Q: Do you interpret Section 51.321 of the Commission's rules to require an RBOC to make available upon request "electronic access" or "logical access" to unbundled network elements? In your opinion, in order to be in compliance with this checklist item must an RBOC offer such access?

Q: . . .

> *Can collocation meet the requirement that access be provided so that CLECs can recombine elements? If not, what else must an RBOC do?*

RESPONSE:

See MCI's April 28 Response, at 7-9.

Unbundled Local Transport #2

Q: Is it your view that to demonstrate compliance with this checklist item, BellSouth must permit CLECs to use shared transport to carry intrastate access traffic? If so, how do you require this without impinging upon the pricing authority of state commissions? Would your concerns be alleviated if the state commission prescribed a rate equal to intrastate access charges for use of unbundled transport to provide intrastate access service?

RESPONSE:

The Commission's views on shared transport have been laid out in detail in the Third Report and Order, and in briefs in the Eighth Circuit defending that Order.

As to the question of use of shared transport for intrastate toll traffic, the Commission has already made clear that CLECs can used leased common transport for exchange access traffic. Third Report and Order ¶ 52. That decision follows directly from the language of section 251(c)(3), which, as a matter of federal law, imposes on LECs a duty to provide network elements to "any requesting carrier" for the provision of "a telecommunication service." Access service, whether intra- or inter- state, is "a telecommunications service." It is equally plain that the Commission has the authority to issue regulations to implement the requirements of section 251(c)(3), authority which BellSouth unsuccessfully challenged in the Eighth Circuit. See Iowa Util. Bd. v. Federal Communications Comm'n, 120 F.3d 753, 808-14 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998).

Finally, nothing in the Eighth Circuit's pricing decision takes away the Commission's authority to implement the Act's unbundling requirements. The Commission's decision to implement the Act's mandate that elements be unbundled and made available to provide telecommunications service does not impinge in any way on the states' ability to set either the wholesale element price for shared transport, or the retail intrastate access charges. BellSouth suggests that a state might set the cost of shared transport to be the same as the cost of intrastate access. It is odd for BellSouth to ask the Commission to comment on this suggestion since BellSouth has successfully persuaded the Eighth Circuit that the Commission has no authority to consider element prices at all. Under the circumstances, there is no reason for the Commission to comment on BellSouth's suggestion. That said, BellSouth's suggestion runs afoul of the Act's requirement that element prices be cost-based.

911/E911, OS/DA #1

Q: Focusing on our enabling CLECs to download the DA database, how do you propose that we resolve any conflict between contractual obligations not to make this information available and a Commission order to do so? Does your answer differ based on whether the non-disclosure provision is a term in an interconnection agreement?

RESPONSE:

The Act requires all LECs to provide CLECs with dialing parity, which by law includes "nondiscriminatory access to . . . directory assistance, and directory listing . . . ." 47 U.S.C. § 251(b)(3). The Commission specifically requires that to implement this requirement, a LEC must provide "directory listings to competing providers in readily accessible magnetic tape or electronic formats in a timely fashion upon request." 47 C.F.R. § 51.217(c)(3)(ii). "The purpose of requiring 'readily accessible' formats is to ensure that no LEC, either inadvertently or intentionally, provides subscriber listings in formats that would require the receiving carrier to expend significant resources to enter the information into its systems." Second Report and Order ¶ 141. The Commission noted that the purpose of this requirement is to foster new and enhanced services. Id.

In addition, incumbent LECs are required by section 251(c)(3) to provide nondiscriminatory access to network elements, which the Act expressly defines as including "databases." 47 U.S.C. § 153(29). The Commission has specifically found that RBOCs must provide DA databases as stand-alone unbundled network elements on any technical feasible basis. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, ¶¶ 534, 538 (Aug. 8, 1996) ("incumbent LECs must provide access to databases as unbundled network elements"); 47 C.F.R.

§ 51.217(c)(3)(ii). The Eighth Circuit has also held that "directory assistance" is a network element subject to unbundling under the Act. See Iowa Util. Bd.,120 F.3d at 808.

The competitive checklist requires nondiscriminatory access to network elements in accordance with section 251(c)(3) (checklist item ii), nondiscriminatory access to directory assistance services (checklist item vii), nondiscriminatory access to databases (checklist item x), and nondiscriminatory access to services and information needed to implement dialing parity as dialing parity is defined in section 251(b)(3), *i.e.*, including directory listings (checklist item xii). Thus, section 271 unambiguously requires that BOCs make their DA databases available to CLECs, on a nondiscriminatory basis, including in machine-readable format. As stated in Chairman Kennard's March 20, 1998 letter to Senators McCain and Brownback, at vii-2, "to comply with the statutory nondiscrimination requirement, the BOC must . . . allow competing carriers to download all the information in the BOC's directory assistance database."[1]

Many BOCs have argued that they cannot provide ITC listings because of agreements with the independent carriers that require confidentiality of those listings. Whatever the contractual agreements between a BOC and independent telephone companies, those agreements must give way to the public law expressed in statutes or regulations. See, e.g., Mineworkers v. Pennington, 381 U.S. 657, 665 (1965); Shelley v. Kraemer, 334 U.S. 1, 18-23 (1948); see generally Restatement (Second) of Contracts, § 178 cmt. a (a "court is bound to carry out the

[1] In addition, as a condition of its grant of BellSouth's request to provide reverse DA services to its long-distance affiliate, the Commission required BellSouth to provide competitors with "all directory listing information that it uses to provide its interLATA reverse directory assistance services," and on identical terms and prices. The Commission noted that BellSouth's competitive advantages in its DA database resulted from its monopoly status, and that its refusal to provide comprehensive databases to CLECs constituted unjust and unreasonable discrimination. In re: Bell Operating Companies, CC Docket No. 96-149, ¶ 82 (Feb. 6, 1998).

legislative mandate with respect to the enforceability of [any] contract term"). This principle is no different if the private agreement is an interconnection agreement sanctioned by federal law. See Hawaiian Airlines v. Norris, 114 S. Ct. 2239 (1996) (terms of federally mandated Railway Labor Act contracts are superseded by positive law). A BOC simply cannot contract out of its legal obligations. Contracting parties typically agree that terms in the agreement give way to inconsistent legal requirements, but even if the contract is silent on that point, it is the private agreement, and not the public law, that must give way.

A contractual limitation on providing directory listings of independents to CLECs is no different in this respect to a contractual provision purporting to prevent a BOC from leasing a loop, transport, or any other element it is required to furnish on nondiscriminatory terms, or a contract purporting to allow a BOC to discriminate in employment practices in violation of civil rights laws and regulations. If a BOC provides directory assistance service that includes listings of independents, it is discriminatory and contrary to federal law if CLECs do not have the same database. Similarly, because the database is itself an unbundled element, it must be provided to CLECs without restriction on the CLEC's right to use the element in any way it chooses to provide telecommunications services. The CLECs are not required to engage in any conduct to assist the BOCs in any negotiation with independent telephone companies. If the BOCs have agreed to contractual terms that are contrary to law, it is up to them to resolve the problem.

911/E911, OS/DA #2

> *Q: You indicate in the same response that you are also discussing whether a BOC must provide unbranded or rebranded OS/DA through its own OS/DA platform in those states in which the public service commission has concluded that it is not technically feasible for an RBOC to provide unbranded or rebranded OS/DA to CLECs using the RBOC's OS/DA platform.*

. . .

How would you expect us to reconcile the conflict between your conclusion and that of the state commission?

As a practical matter, how are we to handle this possibility in preparing our 271 applications?

RESPONSE:

See MCI's April 28 Response, at 15-18.

Number Portability #3

Q: In that same response, in discussing long term number portability you say that a timely filed request for extension of the Commission's implementation schedule would toll the obligation to comply with the Commission's rules for purposes of checklist compliance. You add that denial of that request would be grounds for concluding that this checklist item had not been met. Would the grant of such a request toll the obligation to comply for checklist purposes for the duration of the time extension?

RESPONSE:

If the Commission determines in an LNP proceeding that a BOC cannot feasibly meet the implementation schedule through no fault of its own, that finding would apply in a section 271 proceeding. The BOC would still have to demonstrate that it is able to meet the revised implementation schedule as soon as the extrinsic obstacles to compliance are removed and would, of course, have to meet the requirements applicable to ILNP during the extension period.

Reciprocal Compensation #1

Q: Can an RBOC meet checklist item 13 when it is withholding payments to a CLEC because of disputes over the nature of the traffic originating on the BOC's network? because of disputes over the amount of traffic originating on the BOC's network?

RESPONSE:

A BOC should not be deemed out of compliance with checklist item 13 if there are legitimate auditing issues, i.e., it has a reasonable and good faith basis for questioning the

calculation of the amount of traffic at issue. However, a BOC should not be excused from its obligations under checklist item 13 as a result of its unilateral decision that certain types of traffic should not be subject to the reciprocal compensation requirements; the Commission, not the BOCs, ultimately decides the scope of the reciprocal compensation requirements.

Resale #1

Q: Why does your requiring a resale discount on CSAs not impinge on state public service commissions' authority to determine the extent to which there should be any discount for this service?

RESPONSE:

As explained in the Commission's brief to the D.C. Circuit on appeal of the denial of BellSouth's section 271 application for South Carolina, the Commission has full authority to require a BOC to sell CSAs at a discount because a refusal to do so effectively creates a general exemption from the Act's requirement that any services be resold to competing carriers at a discount. § 251(c)(4)(A). The Eighth Circuit confirmed that the Commission has jurisdiction to "defin[e] the overall scope of the incumbent LECs' resale obligation." If a state commission could create a general exemption of all CSAs from the Act's requirement that retail offerings be available for resale at a discount from the retail price, the Commission would no longer possess its unquestioned authority to define the scope of the Act's resale obligations. A state commission's conclusion that the appropriate discount for all CSAs is 0% is equivalent to a finding that CSAs fall outside the scope of the BOC's duty to resell telecommunications services at a discount. Such a conclusion is not addressed to pricing, but to the scope of the resale obligation -- an area which the Eight Circuit recognizes falls within the Commission's authority.

Track A/Track B ## 1-5

Q: Under what circumstances will a PCS provider's operation in a state enable us to satisfy the requirements of Track A? More generally, have you settled on a legal standard for determining when wireless carriers are "competing carriers."

RESPONSE:

A PCS provider is a "competing" provider within the meaning of Track A only if it provides an "actual commercial alternative" to the BOC for subscribers of residential and business telephone service. Okla. Order ¶ 14; La. Order ¶ 73. For PCS to be an actual commercial alternative, its pricing and technical capacity (including the speed of data transmission and the ability to serve multiple telephones with a single telephone number) must be such that it is a viable and realistic substitute for wireline service. The same test would apply to any wireless service that otherwise qualifies as telephone exchange service. In light of the Commission's recent findings that, due to pricing and technical constraints, PCS is not yet a substitute for wireline service, the Commission would expect to see evidence that a significant proportion of ordinary residential and business subscribers had chosen PCS (or other wireless services that would qualify as telephone exchange services) as a *substitute for, and not a complement to,* their basic wireline service.

Q: Would you find Track A requirements to be met if BellSouth had an approved interconnection agreement with a competitor that was serving business customers over its own facilities and residential customers through resale? Would the Track A requirement be met if one competitor was serving business customers over its own facilities and a different competitor was serving residential customers through resale?

RESPONSE:

See MCI's April 28 Response, at 2-4.

Q: On March 3, we discussed whether a state commission's imposing an implementation schedule on CLECs, finding that no CLEC was meeting the schedule and then certifying its finding to the Commission would permit us to proceed under Track B. At that time we posed the following hypothetical. Suppose a state commission required all CLECs

already with interconnection agreements to take reasonable steps to compete for residential customers within three months of the commission's imposing this requirement. Also suppose that at the end of the three months the commission could reasonably certify that these CLECs had not taken such reasonable steps and that the commission so certified. Under this hypothetical, would Track B be open to an RBOC seeking 271 authorization for that state? If not, why not?

RESPONSE:

See MCI's April 28 Response, at 6-7. If a state commission properly concluded that all requesting CLECs violated the terms of their interconnection agreements approved under section 252, by failing to comply, within a reasonable period of time, with the agreements' implementation schedules, Track B would apply.

Q: Have you clarified your thinking on whether Track A is open if an RBOC can demonstrate that there is a facilities-based CLEC offering service to the owner of a building who then resells it to his tenants?

RESPONSE:

See MCI's April 28 Response, at 5-6.

Q: Must an interconnection agreement relied on to show Track A compliance in a state and the SGAT for that state satisfy all the checklist items, or may we rely upon more than one agreement to show compliance with the checklist items?

RESPONSE:

The Act unambiguously requires a BOC to rely on implementation of one or more interconnection agreements, not an SGAT, to satisfy Track A. (§§ 271(c)(1)(A), 271(d)(3)(A)). A BOC may not, therefore, rely on an SGAT in any respect to satisfy Track A. A BOC may, however, rely on provision of access and interconnection pursuant to multiple interconnection agreements in order to satisfy Track A.

Public Interest -- #2

Q: What, if anything, in addition to its compliance with the checklist items and Section 272 must an RBOC satisfy to receive authorization?

RESPONSE:

The Act clearly spells out the requirements for section 271 approval, including the requirements of satisfying Track A or Track B (where it applies), full implementation of the checklist, satisfaction of section 272, and proof that the requested authorization is consistent with the public interest, convenience, and necessity. § 271(d)(3).

April 30, 1998